APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14,095

LILLIAN CAULDER, *Appellant*,

v.

DURHAM HOUSING AUTHORITY, and C. S. OLDHAM, CARL R. HARRIS, E. W. MIDGETTE, H. F. SEEMAN, JR., CHARLES A. ROACH and ARTIS PLUMMER, individually and in their official capacity as members of the Durham Housing Authority, *Appellees*.

Appeal From the United States District Court for the Middle District of North Carolina, at Durham.

Eugene A. Gordon, District Judge.

(Argued June 2, 1970 Decided November 6, 1970.)

Before SOBELOFF and WINTER, Circuit Judges, and LEWIS, District Judge.

Charles Lawrence James for Appellant, and William Y. Manson (Daniel K. Edwards, on brief) for Appellees.

WINTER, Circuit Judge:

In *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268 (1969), the Supreme Court held that the Durham Housing Authority, one of the defendants in this case, must comply with a Department of Housing and Urban Development (HUD) circular which requires that before a tenant can be evicted he must be given notice of the reasons for the eviction and an opportunity to reply to

those reasons.'[1] In that case the Court declined, on the ground of prematurity, to define the incidents of a hearing which would comport with the requirements of due process. Those questions are before us now in plaintiff's suit for a declaratory judgment that she was denied due process of law by the termination of her lease and an injunction to prohibit the Housing Authority from evicting her or making any attempt to evict her without compliance with her due process rights.

The district court dismissed the complaint on the ground that even if federal jurisdiction was present "justice and

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[1] The pertinent portions of the circular follow:

Within the past year increasing dissatisfaction has been expressed with eviction practices in public low-rent housing projects. During that period a number of suits have been filed throughout the United States generally challenging the right of a Local Authority to evict a tenant without advising him of the reasons for such eviction.

Since this is a federally assisted program, we believe it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish.

In addition to informing the tenant of the reason(s) for any proposed eviction action, from this date each Local Authority shall maintain a written record of every eviction from its federally assisted public housing. Such records are to be available for review from time to time by HUD representatives and shall contain the following information:

1. Name of tenant and identification of unit occupied.
2. Date of notice to vacate.
3. Specific reason(s) for notice to vacate. For example, if a tenant is being evicted because of undesirable actions, the record should detail the actions which resulted in the determination that eviction should be instituted.
4. Date and method of notifying tenant with summary of any conferences with tenant, including names of conference participants.
5. Date and description of final action taken.

comity would best be served by giving the North Carolina courts an opportunity to hear petitioner's claim." We believe that plaintiff has alleged the denial of due process rights for which redress is presently available in the federal courts. We reverse and remand the case to the district court for further proceedings consistent with our views.

I

Since 1963, plaintiff has been a tenant in a federally assisted public housing project owned and operated by the Housing Authority of the City of Durham, North Carolina. The Housing Authority is an agency of the State of North Carolina. N.C.Gen.Stat. §§ 157-1, *et seq.* She occupies an apartment under a written lease creating a month-to-month tenancy with provision for automatic renewals for successive terms of one month unless either party gives notice in writing fifteen days before the end of any month that the lease will terminate at the expiration of that term. On February 19, 1969, she attended a meeting with the Housing Authority project manager, at which she was informed that several of her neighbors had complained of the conduct and morals of her children. The identity of the complaining neighbors, however, was not disclosed. On March 1, 1969, she received written notice from the Housing Authority that her lease would be terminated for cause at the expiration of the current month. The letter specified neither the names of the complainants nor the offenses of which her children were accused but asserted that she had been previously informed of the causes.

The plaintiff obtained legal assistance and requested a written list of specific charges. A meeting with the executive director of the Housing Authority was arranged and held on March 18. At the meeting she and her attorney were informed that the meeting constituted "an administrative hearing"—presumably intended to comply with

the decision in *Thorpe*. The executive director read aloud from certain papers which he represented as affidavits. The papers contained complaints about the plaintiff's children, which included allegations of specific immoral acts, all of which the plaintiff denied. Neither plaintiff nor her attorney was permitted to see the affidavits nor were the names of the complainants disclosed.

Nine days later a hearing was conducted before the commissioners of the Housing Authority. The commissioners denied the requests of plaintiff's attorney for the specifics of the charges, the names of the complainants, and the rules governing the manner in which the hearing would be conducted. The evidence of the complaining witnesses was heard in camera with no opportunity for plaintiff to challenge or cross-examine them. Her attorney, however, was permitted to introduce affidavits from neighbors who considered plaintiff a satisfactory tenant. Plaintiff was not told the names of the persons making complaints nor the dates of specific acts of misconduct or immoral behavior on the part of her children.

When the Housing Authority persisted in its decision not to renew her lease, she brought suit in the district court under 28 U.S.C.A. § 1343(3) and 42 U.S.C.A. § 1983. Her complaint sought a declaratory judgment that she was denied due process of law by the termination of her lease without adequate notice of the specific reasons for its termination and without a hearing (1) at which the names of the complainants would be disclosed, (2) at which she would be able to cross-examine the complainants and other witnesses against her, (3) at which the complainants would give their evidence in her presence, and (4) for which there would be predisclosed procedural rules. She also sought an injunction to prohibit the Housing Authority from evicting her or making any attempt to evict her without compliance with the requirements of due process. At the time suit was filed in the district

court, plaintiff apparently made no effort to obtain a preliminary restraining order. Five days later defendants instituted a small claim action for summary ejectment in the state district court. A motion for a temporary restraining order in the United States District Court was then filed and restraint was granted on May 16, 1969. The proceeding in the state district court before a magistrate thereof was held in abeyance. When the United States District Court dismissed the complaint, plaintiff filed a notice of appeal and a motion for an injunction pending an appeal to us. Before the motion for injunction pending appeal could be acted upon, defendants pressed their action before the magistrate and obtained an order of summary eviction. Plaintiff appealed from this order to the state district court, but the appeal has not been perfected because plaintiff has been unable to post bond in an amount equivalent to one year's rent, as required by N.C.Gen. Stat. § 42-34, in order to have her appeal heard.

II

The district court seemed uncertain of its subject matter jurisdiction over this case, but we entertain no such doubts. 28 U.S.C.A. § 1343(3) grants original jurisdiction to the district courts "[t]o redress the deprivation, under color of any State law, * * * any right, privilege or immunity secured by the Constitution of the United States * * *." In addition, 42 U.S.C.A. § 1983 provides that "[e]very person who, under color of any statute * * * of any State * * * subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights * * * secured by the Constitution * * * shall be liable to the party injured in [a] * * * suit in equity." Plaintiff's complaint alleges that the Housing Authority, a state agency, has deprived her of the hearing required by the due process clause of the fourteenth amendment. Hence, measured by these statutes, the district court had original jurisdiction.

Defendants assert that the anti-injunction statute, 28 U.S.C.A. § 2283, constitutes a bar to plaintiff's prayer for an injunction against an execution of the judgment of eviction obtained in the state court proceedings. Although the point is not fully developed in defendants' brief (and not mentioned in plaintiff's brief), the defendants contend that a state court is as competent a forum as the district court to adjudicate plaintiff's claims. Reference is made to the concluding language in *Thorpe*, "we have no reason to believe that, once petitioner is told the reasons for her eviction she cannot effectively challenge their legal sufficiency in whatever eviction proceedings may be brought in the North Carolina courts." 393 U.S. at 284. Therefore, they contend, it cannot be said that it will be necessary for the district court to enjoin state proceedings "in aid of its jurisdiction"—the only exception to the flat prohibition against staying proceedings in a state court which would appear to have any possible application.

The short answer is that the record, if any, of the summary eviction proceedings before the magistrate who granted summary eviction is not before us nor has it been tendered. We do not know if the claims asserted here were asserted there and, if so, the reasons for their rejection, whether on the ground of lack of jurisdiction to decide them or some other reason. In passing upon this contention, we are thus confined to an examination of the North Carolina General Statutes.

N.C.Gen.Stat. § 42-26 permits summary ejectment, *inter alia*, "[w]hen a tenant in possession of real estate holds over after his term has expired." The statute would thus seem to confine the issue before the magistrate to the simple question of whether plaintiff was holding over and continuing in possession of demised premises after her term had expired. Section 42-26 also permits summary ejectment for breach of a condition of the lease and for nonpayment of rent. It is significant that the final notice of termination on which the Housing Authority proceeded

before the magistrate constituted an exercise of the unlimited power of termination contained in the lease. It did not condition termination on the fact that any covenant of the lease had been breached, or that the rent had not been paid. The case is thus different from *Johnson* v. *Tamsberg*, —— F. 2d —— (No. 13,941, 4 Cir., July 31, 1970), where the Housing Authority of Charleston did not seek to obtain summary ejection on the basis of the exercise of an unlimited discretion to terminate the tenancy but rather undertook to prove specific acts constituting a breach of the lease and justifying termination.

We are told that plaintiff has appealed the judgment of the magistrate, but it is not disputed that the appeal has not been perfected because plaintiff is financially unable to post bond in an amount equivalent to one year's rent as required by N.C.Gen.Stat. § 42-34 in order to have her appeal heard. Even if she would be permitted to question the validity of the termination of her term at the *de novo* proceedings constituting the appeal, our examination of N.C.Gen.Stat. § 42-34 fails to disclose any provision for waiver of the bond to perfect the appeal and we have been referred to no case law, nor have we found any, which would permit waiver. Thus, on the record before us, plaintiff's right, if any, to litigate the issues in a state court appears more theoretical than real. We conclude, therefore, that the factual basis on which to invoke the prohibition of § 2283 is lacking and the case is one in which the state proceedings may be enjoined "in aid of * * * [the district court's] jurisdiction."

III

Other courts, in other contexts, have held that state-created, federally-funded, locally-administered housing authorities are constrained to conduct their operations within the limits of the due process clause of the fourteenth amendment. *Rudder* v. *United States*, 226 F. 2d 51 (D.C. Cir. 1955); *Holt* v. *Richmond Redevelopment and Housing Authority*, 266 F. Supp. 397 (E.D. Va. 1966); *Thomas* v. *The*

Housing Authority of the City of Little Rock, 282 F. S. 575 (E.D. Ark. 1967).

Whatever question there might have been in the application of the due process clause or the scope of the protection which it affords with regard to the eviction of tenants in public housing has been laid to rest by the decision in *Goldberg* v. *Kelly*, —— U.S. —— (1970). In *Goldberg* the question was one of the application of the due process clause to the termination of welfare benefits, and particularly whether procedural due process required notice, hearing and administrative adjudication *before* benefits were terminated rather than after. In the case no substantial contention that due process was inapplicable was advanced. Nevertheless, the Court commented on why the clause was applicable, and its discussion is pertinent to the issue before us:

> Appellant does not contend that procedural due process is not applicable to the termination of welfare benefits. Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right.'" Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, or to denial of a tax exemption, or to discharge from public employment. The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we have said in Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895, 6 L. Ed. 2d 1230, 1236, 81 S. Ct. 1743 (1961), "consideration of what procedures due process may require under

any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." (Footnotes eliminated.) *Id.* at ——.

The "privilege" or the "right" to occupy publicly subsidized low-rent housing seems to us to be no less entitled to due process protection than entitlement to welfare benefits which were the subject of decision in *Goldberg* or the other rights and privileges referred to in *Goldberg*.

The program of subsidized low-cost public housing has been undertaken to serve a variety of state interests,[9]

[9] N.C.Gen.Stat. § 157-2, which is part of the statute authorizing the creation of defendant Housing Authority, sets forth this declaration of legislative findings and purposes.

It is hereby declared that unsanitary and unsafe dwelling accommodations exist in urban and rural areas throughout the State and that such unsafe or unsanitary conditions arise from overcrowding and concentration of population, the obsolete and poor condition of the buildings, improper planning, excessive land coverage, lack of proper light, air and space, unsanitary design and arrangement, lack of proper sanitary facilities, and the existence of conditions which endanger life or property by fire and other causes; that in such urban and rural areas many persons of low income are forced to reside in unsanitary or unsafe dwelling accommodations; that in such urban and rural areas there is a lack of safe or sanitary dwelling accommodations available to all the inhabitants thereof and that consequently many persons of low income are forced to occupy overcrowded and congested dwelling accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the citizens of the State and impair economic values; that these conditions cannot be remedied by the ordinary operation of private enterprise; that the clearance, replanning and reconstruction of such areas and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which public money may be spent and private property acquired; that it is in the public interest that work on such projects be instituted as soon as possible; and that the necessity for the provisions hereinafter enacted is hereby declared as a matter of legislative determination to be in the public interest.

Should an eligible tenant be wrongfully evicted, some frustration of these interests will result. The impact on the tenant is no less. Not only is he, by definition, one of a class who cannot afford acceptable housing so that he is "condemned to suffer grievous loss," but should it be subsequently determined that his eviction was improper the wrong cannot be speedily made right because of the demand for low-cost public housing and the likelihood that the space from which he was evicted will be occupied by others. In short, both governmental and individual interests are furthered by affording due process in the eviction procedure.

Given the premise that the due process clause applies, *Goldberg* also defines the scope of its application. We fully agree with the Second Circuit's conclusion in *Escalera v. New York City Housing Authority*, —— F. 2d —— (2 Cir. 1970), that *Goldberg* is equally applicable to the hearing to be afforded tenants of public housing before the determination to evict them.

Succinctly stated, *Goldberg* requires (1) timely and adequate notice detailing the reasons for a proposed termination, (2) an opportunity on the part of the tenant to confront and cross-examine adverse witnesses, (3) the right of a tenant to be represented by counsel provided by him to delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination and generally to safeguard his interests, (4) a decision, based on evidence adduced at the hearing, in which the reasons for decision and the evidence relied on are set forth, and (5) an impartial decision maker. We refer to *Goldberg* and *Escalera* for further elaboration of these requirements.[5]

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[5] Both *Goldberg* and *Escalera* also recognize the possibility that in some instances the right to procedural due process must bend to a compelling governmental interest in summary adjudication. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367

IV

In the light of what we have said, plaintiff manifestly has alleged a cause of action. We reverse the judgment of the district court and return the case for further proceedings consistent with this opinion. The injunction granted pending appeal shall be continued until final disposition by the district court.

REVERSED and REMANDED.

Lewis, District Judge, dissenting

If I read the majority opinion correctly, this Court now declares that the laws of North Carolina do not provide for "due process" hearings in public housing eviction cases. Specifically, they say: The plaintiff's right, if any, to litigate the issues in the state courts appears more theoretical than real.

They reached this conclusion by examining and construing the North Carolina General Statutes, § 42-26, to confine the issue before the magistrate to the simple question of whether the tenant was holding over and continuing in possession after her term had expired and because § 42-34 failed to disclose any provision for waiver of the bond requirements in an amount equal to one-year's rent to perfect an appeal.

I cannot concur because the decision is contrary to the findings of the District Court and there is no evidence in this record to support it.

The District Court found that the tenant knew why she was being evicted and that she could challenge these rea-

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U.S. 886, 895 (1961). We do not foreclose this possibility here. But this case was decided on motion to dismiss, and governmental interests, if any, competing with plaintiff's apparent rights have not been developed in this record. If there are compelling competing governmental interests, they may be developed on remand and weighed by the district court, which may then decide the effect to be given them.

sons and raise any constitutional issues in the state court proceeding. These findings are binding on this Court unless they are plainly erroneous—and no such finding was here made. See Rule 52, F.R.Civ.P.

The record discloses that the tenant—upon receipt of the notice of termination of her lease—filed suit in the United States District Court for injunctive and declaratory relief.

Her complaint sought only a declaration that she was denied due process by the termination of her lease, absent specific reasons and without a hearing at which the complainants would be required to give their testimony in her presence and be subjected to cross-examination.

The heart of her complaint was the refusal of the Housing Authority to disclose the names of the other tenants in the project who had reported immoral acts on the part of her children, and to require their presence at the conference for cross-examination.

She made no attempt to secure a temporary restraining order to prohibit her eviction until some ten days after ejectment proceedings had been commenced in the North Carolina state courts. The state court proceedings were then held in abeyance until the United States District Court could hear the matter.

Upon dismissal by the District Judge—after reserving all questions for determination by the state courts—the Housing Authority proceeded in the magistrate's court and obtained an order of summary eviction.

We have been told this order has been appealed to the Superior Court of North Carolina—and that bond has not been posted—We have not been told what defenses, if any, were raised in the magistrate's court—and we have not been told whether the tenant has asked the Superior Court of North Carolina to waive the appeal bond requirement due to her indigency.

We do know, however, from the record in this case that the defendants agreed that the tenant could deposit the monthly rent in escrow, in lieu of bond, during the pendency of the state action, and that this was in fact done.

Although the records of the state court proceeding are not before us—we do know that the tenant in this case was told the reasons for her eviction—her attorney admits she was—and the District Court found she was.

Former Chief Justice Warren said in Thorpe, 393 U.S. 268 (1969):

> ". . . We have no reason to believe that once petitioner is told the reasons for her eviction she cannot effectively challenge their legal sufficiency in whatever eviction proceedings may be brought in the North Carolina courts. . . ."

Justice White, dissenting in the same case heard in 1967 (386 U.S. 670), said the tenant had the opportunity (in the lower court) to explain fully why she was evicted.

Judge Gordon, in his memorandum opinion in this case, was equally positive when he stated

> "If a state judge found that the Housing Authority has not complied with Thorpe it is unthinkable that he would allow summary ejectment—and if he found that the Housing Authority had violated due process of law it is equally unthinkable that he would allow summary ejectment."

The majority say—even if she [tenant] would be permitted to question the validity of the termination of her term at the de novo proceeding—she has been denied that right here—because she was unable to post the required appeal bond and the North Carolina statutes do not permit waiver.

What the North Carolina court would have done in this case we do not know—We do not even know whether the

tenant asked for a waiver. State courts in this circuit have in the past waived statutory requirements for appeal, and this Court should not speculate what North Carolina would have done in this case.

The Supreme Court of the United States refused to speculate in a similar situation—because of an ambiguity in the record of a Connecticut proceeding concerning the underlying reason appellants were denied an opportunity to appeal. See Simmons v. West Haven Housing Authority, 399 U.S. 510 (1970).

The Supreme Court—in Simmons—has refused to decide whether the Connecticut General Statutes requiring a bond for the protection of his landlord from a tenant who wished to appeal from a judgment in a summary eviction proceeding, offend either the due process or equal protection clauses of the Fourteenth Amendment if applied to foreclose appellate review for those too poor to post bond.

We should likewise refuse to decide that question in this case.

State courts are the sole tribunal having jurisdiction to hear and determine eviction suits. They are duty bound to follow the Constitution of the United States and the decisions of the Supreme Court of the United States—and I have no reason to doubt that the North Carolina courts would not have so done here had they been given the opportunity.

Assuming that the Housing Authority has now obtained a final judgment in the North Carolina courts and has in fact evicted the tenant from the demised premises—which, of course, is not disclosed by the record in this case—I still am of the opinion that the District Court lacked authority to enjoin the North Carolina proceeding for the reasons more succintly stated by Justice Black in the Atlantic Coast case, 398 U.S. 281 (1970):

> ", . . . a federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state

> court proceedings merely because those proceeding interefere with the protected federal right or invade an area preempted by federal law, even when the interference is unmistakenly clear. This rule applies regardless of whether the federal court itself has jurisdiction over the controversy. . . . Second, if the District Court does have jurisdiction, it is not enough that the requested injunction is related to that jurisdiction, but it must be *'necessary in aid of'* that jurisdiction. . . . [L]ower federal courts possess no power whatever to sit in direct review of state court decisions. . . . Unlike the Federal District Court, this Court does have potential appellate jurisdiction over federal questions raised in state court proceedings, and that broader jurisdiction allows this Court correspondingly broader authority to issue injunctions 'necessary in aid of its jurisdiction.' "

On the premise that the due process clause applies, the majority here rule that Goldberg[1] is equally applicable to the hearing to be afforded tenants of public housing before the termination to evict them.

My quarrel is not whether the due process clause applies in the eviction procedure—it clearly does. What troubles me is equating the termination of welfare benefits, as described in Goldberg, with the constitutional requirements necessary to the determination of a housing authority lease and the subsequent eviction of the tenant.

There is a substantial difference between these two types of cases. In the welfare case benefits were terminated by certain review officials—The recipient then had to request a post-termination "fair" hearing before an independent state hearing officer. The pre-notice conference in this case does not evict the tenant—a full judicial hearing is required before she can be evicted.

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[1] Goldberg v. Kelly, 397 U.S. 254 (1970).

Justice Brennan, in Goldberg, held the welfare recipient must be afforded an evidentiary hearing before termination of benefits—In so doing, in footnote 14 on page 12, he pointed out—

> Due process does not, of course, require two hearings. If, for example, a State simply wishes to continue benefits [here, possession] until after a "fair" hearing there will be no need for a preliminary hearing.

Justice Douglas took substantially the same position in his concurring opinion in Thorpe when he questioned whether there was a constitutional requirement for an administrative hearing in the case where a tenant can have a full judicial hearing when the Housing Authority attempts to evict him.

Judge Sobeloff took the same position in Johnson v. Tamsberg, ... F. 2d ..., decided by another panel of this Court on July 31, 1970 (No. 13,941).

The majority get around Johnson by concluding the Housing Authority in this case proceeded before the magistrate on the basis of the final notice of termination [of the lease]. This has to be an assumption—because the record of what took place before the magistrate was not before us.

Notwithstanding the abhorence of faceless informers—I do not agree that the Housing Authority should be required to give the tenant the names of all the neighbors who filed complaints of misconduct against her—That would create and only intensify neighborhood quarrels and dignify them by converting them into constitutional controversies.

Neither can I agree that this case should be retained and determined by the District Court. Because the plaintiff's attorney thought he could present the issues he was interested in more clearly in the federal court—is not persuasive.

For these reasons I must respectfully note my dissent.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

No. C-84-D-69

LILLIAN CAULDER, *Plaintiff*

v.

DURHAM HOUSING AUTHORITY, ET AL., *Defendants*

Charles Lawrence James, Esq., of Durham, North Carolina, for the Plaintiff.

Daniel K. Edwards, Esq., of Durham, North Carolina, for the Defendants.

Memorandum Opinion

GORDON, District Judge.

The plaintiff, Lillian Caulder, a resident of a low rent public housing project owned and operated by the defendant, Durham Housing Authority, instituted this action on May 1, 1969, alleging that the defendants had, under color of state law, regulation, customs, or usage, engaged in a practice wherein they have done or have failed to do certain things which constituted a substantial violation of the constitutional rights of the plaintiff by the failure to provide a fair administrative hearing conforming to constitutional standards.

Plaintiff seeks, pursuant to 42 U.S.C. § 1983, the Housing Act of 1937, as amended, 42 U.S.C. § 1401 et seq., and regulations promulgated under it, declaratory and injunctive relief forbidding the termination of her public housing tenancy without the submission of a written notice of the charges relied upon and without the provision of an administrative hearing, complete with confrontation and cross-examination of witnesses. Jurisdiction of the Court

is claimed on the basis of 28 U.S.C. § 1343(3), § 2201, and § 2202.

On or about May 6, 1969, the defendants instituted an action in the General Courts of Justice in Durham County, North Carolina, for summary ejectment.

On May 14, 1969, this Court entered a temporary restraining order restraining and enjoining the defendants from evicting, attempting to evict, or proceeding to evict the plaintiff.

In an answer filed May 21, 1969, the defendants moved for dismissal. On May 26, 1969, the plaintiff filed a motion to strike portions of the answer. The Court has corresponded with the parties and they have agreed that these motions are ready for consideration. For reasons to be set out, the Court holds that the defendants' motion to dismiss should be granted.

Basically, the facts are not in dispute. On or about October 7, 1963, the plaintiff entered into a month-to-month lease with defendant Housing Authority. On February 19, 1969, Mrs. Caulder attended a conference with the Project Manager for the Housing Authority, at which time complaints regarding Mrs. Caulder's children's conduct and morals were discussed. On February 28, 1969, the Housing Authority wrote Mrs. Caulder, stating that her lease was being terminated and that "this termination is for cause and you have been informed as to these causes. I refer you specifically to Section I-E of your Dwelling Lease."

On March 18, 1969, an administrative hearing was held at Mrs. Caulder's request. Mrs. Caulder was represented by counsel. The Executive Director discussed with Mrs. Caulder the contents of several affidavits received from tenants in the project but refused to give the plaintiff the names of these neighbors. Mrs. Caulder stated that the affidavits, which mainly concerned her children's conduct, were "lies". Mrs. Caulder said she wanted to appeal.

On March 27, 1969, a hearing was held before the Commissioners of the Housing Authority. The plaintiff was informed that she would not be given the names of the neighbors who had filed affidavits with the Executive Director and, further, that the Commissioners would not undertake a hearing which would permit the confrontation of these or other individuals as witnesses and cross-examination of them. The plaintiff submitted affidavits of her family's good character.

On March 28, 1969, the Housing Authority notified plaintiff that her lease would be terminated as of April 30, 1969. This complied with the notice provisions of the lease. On May 1, 1969, this action was filed.

A Housing and Urban Development (HUD) circular, issued February 7, 1967, requires the Housing Authority to discuss the reasons for eviction with a tenant before the eviction takes place. It has been held that this circular is mandatory and binding on the Housing Authority of the City of Durham. *Thorpe v. Housing Authority of the City of Durham*, 393 U. S. 268, 89 S. Ct. —, 21 L.ed. 2d 474 (1969); 386 U. S. 670, 87 S. Ct. 1244, 18 L.ed. 2d 394 (1967). In *Thorpe*, the court refused to establish guidelines to insure that a public housing tenant is provided with not only the reasons for eviction but also a hearing that comports with the requirements of due process, stating that this issue was premature.

In the present case, the Housing Authority complied with the HUD circular. This fact is not in dispute. What plaintiff seeks is to go beyond the HUD circular and require much more before she can be evicted.

There is nothing in the record that indicates in any way that the Housing Authority had any motive to displace Mrs. Caulder other than that she is an undesirable tenant. Specifically, it is not alleged that the Housing Authority, in terminating the plaintiff's tenancy at the end of her lease, was motivated by any unconstitutional reason or

motive as was the case in *Holt* v. *Richmond Redevelopment and Housing Authority*, 266 F. Supp. 397 (E.D.Va. 1966). There is no evidence which would indicate the eviction is due to race, religion, sex, political, or social activity.

Plaintiff seeks both injunctive and declaratory relief. 28 U.S.C.A. § 2283 provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

This anti-injunction statute has had a checkered history, is confusing, and is punctured with exceptions. As a general rule, where there is danger of irreparable injury, the injunction may issue. Wright, *Handbook of Federal Courts*, p. 157 (1963).

In the present case, plaintiff alleges that there will be irreparable injury if she is evicted. Such is not the case. She has a limited income. But, it does not follow that because she lives in housing designed to replace slum housing, she must return to slum housing if she is evicted.

To indulge in a detailed discussion of whether there is jurisdiction would not add substance to this Memorandum. Perhaps there is jurisdiction. Ours, however, is a federal-state system. The federal courts are not the sole arbitrators of constitutional rights. State courts are duty bound to follow the United States Constitution and the decisions of the Supreme Court of the United States. In the instant case, it is concluded that justice and comity would best be served by giving the North Carolina courts an opportunity to hear petitioner's claim. This belief is based on several factors.

First, Mrs. Caulder's dwelling lease provides that the lease may be terminated upon fifteen days written notice.

The Supreme Court in *Thorpe* held that the lease was inviolate. N. C. General Statute 42-26 provides:

> "Any tenant or lessee of any house or land and the assigns under the tenant or the legal representatives of such tenant or lessee, who holds over and continues in the possession of the demised premises, or any part thereof, without the permission of the landlord, and after the demand made for his surrender, may be removed from such premises in the manner hereinafter prescribed in any of the following cases:
>
> "(1) when a tenant in possession of real estate holds over after his term has expired."

In the case of *McDonald* v. *Ingram*, 124 N. C. 272, 32 S. E. 677 (1899), the court held that the only question the court can try under Subdivision (1) in this proceeding is, "Was the defendant the tenant of the plaintiff, and (2) does he hold over after the expiration of the tenancy." 32 S.E. at 678.

The Supreme Court of North Carolina in *Housing Authority of the City of Durham* v. *Thorpe*, 267 N. C. 481, held that "it is immaterial what may have been the reason for the lessor's unwillingness to continue the relationship of landlord and tenant after the expiration of the term as provided in the lease." Plaintiff's counsel correctly states that the reversal of this court's decision in the two *Thorpe* cases before the Supreme Court of the United States has raised adequate doubt as to whether this is still an accurate statement of the law in this jurisdiction. Furthermore, *McDonald* did not deal with public housing.

Where state law is uncertain or unclear, it is the better policy for the state courts, not the federal courts, to clarify the state law.

Second, plaintiff contends that the issues of notice, confrontation, cross examination, and due process in an admin-

istrative hearing would be immaterial and irrelevant in a state summary ejectment proceeding. This view is untenable. The state courts are bound by *Thorpe*. If a state judge found that the Housing Authority has not complied with *Thorpe*, it is unthinkable that he would allow summary ejectment. If he found that the Housing Authority had violated due process of law, it is equally unthinkable that he would allow summary ejectment. A constitutional issue is never irrelevant. It can be raised in any proceeding. It is not assumed that the state tribunal is less suited to judiciously determine plaintiff's constitutional rights than a federal tribunal.

Third, plaintiff contends that she will be prejudiced in state court by Chapter 42, Section 34, of the General Statutes of North Carolina which requires a bond equivalent to one year's rent before appeal. This contention is without merit. Defendant's attorney in a letter dated May 12, 1969, stated that

> "We would agree that in lieu of a bond in the State Court the Plaintiff could deposit in an escrow account under the supervision of Mr. James the amount of her current rent each month during the pendency of the State action . . ."

Thus, the plaintiff will in no way be prejudiced by this statute.

Fourth, Chief Justice Warren, writing for the court in *Thorpe* stated:

> "Moreover, even if the Authority does not provide such a hearing, we have no reason to believe that once petitioner is told the reasons for her eviction she cannot effectively challenge their legal sufficiency in whatever eviction proceedings may be brought in the North Carolina Courts." *Thorpe*, 21 L.ed. 2d at 485.

In the present case, plaintiff had a hearing. She knows why she is being evicted. She can challenge these reasons in state court.

Finally, plaintiff's attorney indicates that a major reason for instituting this proceeding in federal court is that the issues he is interested in could be presented more clearly in the federal courts. Such reasoning forms no basis for the exercise of jurisdiction.

It is not the desire of this Court to add to the work of the already overburdened courts of our State. However, the state court is entitled to the opportunity to first hear and determine the constitutional claims of the petitioner. The dismissal of this suit will not deprive plaintiff of any federally guaranteed protections. Plaintiff may raise any constitutional issues in the state proceeding.

Accordingly, it is concluded that the plaintiff's action should be dismissed as to the defendant, Housing Authority of the City of Durham, and as to the individual defendants—both in their individual capacities and as members of the Housing Authority of the City of Durham; and that the temporary restraining order entered on May 16, 1969, be dissolved. Counsel for the defendant will prepare and submit to the Court a proposed Judgment within ten days of this date conforming with this Opinion, first submitting same to plaintiff for approval as to form.

/s/ Eugene A. Gordon
United States District Judge

September 29, 1969

APPENDIX "C"

North Carolina Housing Authorities Law, N. C. General Statutes, Chapter 157

Sec. 157-5. *Appointment, qualifications and tenure of commissioners.*—An authority shall consist of five commissioners appointed by the mayor and he shall designate the first chairman. No commissioner may be a city official.

The commissioners who are first appointed shall be designated by the mayor to serve for terms of one, two, three, four and five years respectively from the date of their appointment. Thereafter, the term of office shall be five years. A commissioner shall hold office until his successor has been appointed and has qualified. Vacancies shall be filled for the unexpired term. Three commissioners shall constitute a quorum. The mayor shall file with the city clerk a certificate of the appointment or reappointment of any commissioner and such certificate shall be conclusive evidence of the due and proper appointment of such commissioner. A commissioner shall receive no compensation for his services but he shall be entitled to the necessary expenses including traveling expenses incurred in the discharge of his duties.

When the office of the first chairman of the authority becomes vacant, the authority shall select a chairman from among its members. An authority shall select from among its members a vice-chairman, and it may employ a secretary (who shall be executive director), technical experts and such other officers, agents and employees, permanent and temporary, as it may require, and shall determine their qualifications, duties and compensation. An authority may call upon the corporation counsel or chief law officer of the city for such legal services as it may require or it may employ its own counsel and legal staff. An authority may delegate to one or more of its agents or employees such powers or duties as it may deem proper. (1935, c. 456, s. 5.)

Local Modification.—City of Wilson: 1935, c. 664.

Sec. 157-6. *Duty of authority and commissioners.*—The authority and its commissioners shall be under a statutory duty to comply or to cause compliance strictly with all provisions of this article and the laws of the State and in addition thereto, with each and every term, provision and covenant in any contract of the authority on its part to be kept or performed. (1935, c. 456, s. 6.)

Sec. 157-7. *Interested commissioners or employees.*—No commissioner or employee of an authority shall acquire any interest direct or indirect in any housing project or in any property included or planned to be included in any project, nor shall he have any interest direct or indirect in any contract or proposed contract for materials or services to be furnished or used in connection with any housing project. If any commissioner or employee of an authority owns or controls an interest direct or indirect in any property included or planned to be included in any housing project, he shall immediately disclose the same in writing to the authority and such disclosure shall be entered upon the minutes of the authority. Failure to so disclose such interest shall constitute misconduct in office. (1935, c. 456, s. 7.)

Sec. 157-8. *Removal of commissioners.*—The mayor may remove a commissioner for inefficiency or neglect of duty or misconduct in office, but only after the commissioner shall have been given a copy of the charges against him (which may be made by the mayor) at least ten days prior to the hearing thereon and had an opportunity to be heard in person or by counsel.

Any obligee of the authority may file with the mayor written charges that the authority is violating willfully any law of the State or any term, provision or covenant in any contract to which the authority is a party. The mayor shall give each of the commissioners a copy of such charges at least ten days prior to the hearing thereon and an opportunity to be heard in person or by counsel and shall within fifteen days after receipt of such charges

remove any commissioners of the authority who shall have been found to have acquiesced in any such willful violation.

A commissioner shall be deemed to have acquiesced in a willful violation by the authority of a law of this State or of any term, provision or covenant contained in a contract to which the authority is a party, if, before a hearing is held on the charges against him, he shall not have filed a written statement with the authority of his objections to, or lack of participation in, such violation.

In the event of the removal of any commissioner, the mayor shall file in the office of the city clerk a record of the proceedings together with the charges made against the commissioners and the findings thereon. (1935, c. 450, s. 8.)

Sec. 157-9. *Powers of authority.*—An authority shall constitute a public body and a body corporate and politic, exercising public powers, and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this article, including the following powers in addition to others herein granted:

To investigate into living, dwelling and housing conditions and into the means and methods of improving such conditions; to determine where unsafe, or insanitary dwelling or housing conditions exist; to study and make recommendations concerning the plan of any city or municipality located within its boundaries in relation to the problem of clearing, replanning and reconstruction of areas in which unsafe or insanitary dwelling or housing conditions exist, and the providing of dwelling accommodations for persons of low income, and to co-operate with any city municipal or regional planning agency; to prepare, carry out and operate housing projects; to provide for the construction, reconstruction, improvement, alteration or repair of any housing project or any part thereof; to take over by purchase, lease or otherwise any housing project

located within its boundaries undertaken by any government, or by any city or municipality located in whole or in part within its boundaries; to manage as agent of any city or municipality located in whole or in part within its boundaries any housing project constructed or owned by such city; to act as agent for the federal government in connection with the acquisition, construction, operation and/or management of a housing project or any part thereof; to arrange with any city or municipality located in whole or in part within its boundaries or with a government for the furnishing, planning, replanning, installing, opening or closing of streets, roads, roadways, alleys, sidewalks or other places or facilities or for the acquisition by such city, municipality, or government of property, options or property rights or for the furnishing of property or services in connection with a project; to arrange with the State, its subdivisions, and agencies, and any county, city or municipality of the State, to the extent that it is within the scope of each of their respective functions, (i) to cause the services customarily provided by each of them to be rendered for the benefit of such housing authority and/or the occupants of any housing projects and (ii) to provide and maintain parks and sewage, water and other facilities adjacent to or in connection with housing projects and (iii) to change the city or municipality map, to plan, replan, zone or rezone any part of the city or municipality; to lease or rent any of the dwelling or other accommodations or any of the lands, buildings, structures or facilities embraced in any housing project and to establish and revise the rents or charges therefor; to enter upon any building or property in order to conduct investigations or to make surveys or soundings; to purchase, lease, obtain options upon, acquire by gift, grant, bequest, devise, or otherwise any property real or personal or any interest therein from any person, firm, corporation, city, municipality, or government; to acquire by eminent domain any real property, including improvements and fixtures thereon; to sell, exchange, transfer, assign, or pledge any prop-

erty real or personal or any interest therein to any person, firm, corporation, municipality, city, or government; to own, hold, clear and improve property; to insure or provide for the insurance of the property or operations of the authority against such risks as the authority may deem advisable; to procure insurance or guarantees from a federal government of the payment of any debts or parts thereof secured by mortgages made or held by the authority on any property included in any housing project; to borrow money upon its bonds, notes, debentures or other evidences of indebtedness and to secure the same by pledges of its revenues, and (subject to the limitation hereinafter imposed) by mortgages upon property held or to be held by it, or in any other manner; in connection with any loan, to agree to limitations upon its right to dispose of any housing project or part thereof or to undertake additional housing projects; in connection with any loan by a government, to agree to limitations upon the exercise of any powers conferred upon the authority by this article; to invest any funds held in reserves or sinking funds, or any funds not required for immediate disbursement, in property or securities in which savings banks may legally invest funds subject to their control; to sue and be sued; to have a seal and to alter the same at pleasure; to have perpetual succession; to make and execute contracts and other instruments necessary or convenient to the exercise of the powers of the authority; to make and execute contracts and other instruments necessary or convenient to the exercise of the powers of the authority; to make and from time to time amend and repeal bylaws, rules and regulations not inconsistent with this article, to carry into effect the powers and purposes of the authority; to conduct examinations and investigations and to hear testimony and take proof under oath at public or private hearings on any matter material for its information; to issue subpoenas requiring the attendance of witnesses or the production of books and papers and to issue commissions for the examination of witnesses who are out of the State or unable to attend before the authority, or excused from

attendance; and to make available to such agencies, boards or commissions as are charged with the duty of abating or requiring the correction of nuisances or like conditions, or of demolishing unsafe or insanitary structures within its territorial limits, its findings and recommendations with regard to any building or property where conditions exist which are dangerous to the public health, morals, safety or welfare. Any of the investigations or examinations provided for in this article may be conducted by the authority or by a committee appointed by it, consisting of one or more commissioners, or by counsel, or by an officer or employee specially authorized by the authority to conduct it. Any commissioner, counsel for the authority, or any person designated by it to conduct an investigation or examination shall have power to administer oaths, take affidavits and issue subpoenas or commissions. An authority may exercise any or all of the powers herein conferred upon it, either generally or with respect to any specific housing project or projects, through or by an agent or agents which it may designate, including any corporation or corporations which are or shall be formed under the laws of this State, and for such purposes an authority may cause one or more corporations to be formed under the laws of this State or may acquire the capital stock of any corporation or corporations. Any corporate agent, all of the stock of which shall be owned by the authority or its nominee or nominees, may to the extent permitted by law exercise any of the powers conferred upon the authority herein. In addition to all of the other powers herein conferred upon it, an authority may do all things necessary and convenient to carry out the powers expressly given in this article. No provisions with respect to the acquisition, operation or disposition of property by other public bodies shall be applicable to an authority unless the legislature shall specifically so state.

Notwithstanding anything to the contrary contained in this article or in any other provision of law an authority may include in any contract let in connection with a project, stipulations requiring that the contractor and any

subcontractors comply with requirements as to minimum wages and maximum hours of labor, and comply with any conditions which the federal government may have attached to its financial aid of the project. (1935, c. 456, s. 9; 1939, c. 130.)

Editor's Note.—The 1939 amendment added the last paragraph.

Authorities created pursuant to Sections 157-3, 157-4, 157-33, and 157-35 are public bodies exercising public powers. Hence, they are sometimes called municipal corporations. Powell v. Eastern Carolina Regional Housing Authority, 251 N.C. 812, 112 S.E. (2d) 386 (1960).

Not Delegation of Legislative Function.—The fact that an administrative board or municipal corporation is authorized to investigate and determine the existence or nonexistence of facts upon which depend the application of the law it is charged with administering is not a delegation of legislative functions. Cox v. Kinston, 217 N.C. 391, S.E. (2d) 252 (1940).

Sec. 157-26. *Tax exemptions.*—The authority shall be exempt from the payment of any taxes or fees to the State or any subdivision thereof, or to any officer or employee of the State or any subdivision thereof. The property of an authority shall be exempt from all local and municipal taxes and for the purposes of such tax exemption, it is hereby declared as a matter of legislative determination that an authority is and shall be deemed to be a municipal corporation. Bonds, notes, debentures and other evidences of indebtedness of an authority heretofore or hereafter issued are declared to be issued for a public purpose and to be public instrumentalities and, together with the interest thereon, shall be exempt from taxes. (1935, c. 456, s. 26; 1953, c. 997.).

Editor's Note.—The 1953 amendment rewrote the third sentence.

For brief comment on the 1953 amendment, see 31 N.C. Law Rev. 442.

Since a housing authority created under Sec. 157-4 and the following section, is a municipal corporation created for a public, governmental purpose, its property is exempt from the State, county and municipal taxation. Wells v. Housing Authority, 213 N.C. 744, 197 S.E. 693 (1938).

Sec. 157-26. *Tax exemptions.*

Since a housing authority, etc.—

The case of Wells v. Housing Authority, 213 N.C. 744, 197 S.E. 693 (1938) construed this article with respect to ad valorem taxes only. Housing Authority v. Johnson, 261 N. C. 76, 134 S.E. 2d 121 (1964).

Authority Is Not Entitled to Refund of Sales Taxes.—A housing authority created pursuant to the provisions of the Housing Authorities Law is a municipal corporation but is not an incorporated city or town, and is not entitled to the refund of sales taxes paid on purchases of tangible personal property pursuant to the provisions of Sec. 105-164.14(c). Housing Authority v. Johnson, 261 N. C. 76, 134 S.E. 2d 121 (1964).

A municipal corporation or public agency created, organized and existing under and by virtue of the laws of this State, more particularly the Housing Authorities Law, codified as this article, is not a charitable organization within the meaning of the refund provisions of Sec. 105-164.14(b). Housing Authority v. Johnson, 261 N. C. 76, 134 S.E. 2d 121 (1964).

Sec. 157-29. *Rentals and tenant selection.*—It is hereby declared to be the policy of this State that each housing authority shall manage and operate its housing projects in an efficient manner so as to enable it to fix the rentals for dwelling accommodations at the lowest possible rates

consistent with its providing decent, safe and sanitary dwelling accommodations, and that no housing authority shall construct or operate any such project for profit, or as a source of revenue to the city. To this end the authority shall fix the rentals for dwellings in its projects at no higher rates than it shall find to be necessary in order to produce revenues which (together with all other available monies, revenues, income and receipts of the authority from whatever sources derived) will be sufficient

(1) To pay, as the same become due, the principal and interest on the bonds of the authority;

(2) To meet the cost of, and to provide for, maintaining and operating the projects (including the cost of any insurance) and the administrative expenses of the authority; and

(3) To create (during not less than the six years immediately succeeding its issuance of any bonds) a reserve sufficient to meet the largest principal and interest payment which will be due on such bonds in any one year thereafter and to maintain such reserve.

In the operation or management of housing projects an authority shall at all times observe the following duties with respect to rentals and tenant selection:

(1) It may rent or lease the dwelling accommodations therein only to persons who lack the amount of income which is necessary (as determined by the housing authority undertaking the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding;

(2) It may rent or lease the dwelling accommodations only at rentals within the financial reach of such persons;

(3) It may rent or lease to a tenant dwelling accommodations consisting of the number of rooms (but no greater number) which it deems necessary to provide safe and sanitary accommodations to the proposed occupants thereof, without overcrowding; and

(4) It shall not accept any person as a tenant in any housing project if the person or persons who would occupy the dwelling accommodations have an annual net income in excess of five times the annual rental of the quarters to be furnished such person or persons, except that in the case of families with three or more minor dependents, such ratio shall not exceed six to one; in computing the rental for this purpose of selecting tenants, there shall be included in the rental the average annual cost (as determined by the authority) to occupants of heat, water, electricity, gas, cooking range and other necessary services or facilities, whether or not the charge for such services and facilities is in fact included in the rental.

Nothing contained in this section shall be construed as limiting the power of an authority to vest in an obligee the right, in the event of a default by the authority, to take possession of a housing project or cause the appointment of a receiver thereof, free from all the restrictions imposed by this section. (1939, c. 150.)

Preference of Landowners Conveying Property.—An agreement of a rural housing authority giving priority in occupancy of its dwelling units to those landowners, or the tenants, sharecroppers or farm wage hands of such landowners, who convey property to the authority, provided that they come within the definition of families of low income is not unlawful discrimination in favor of such class. Mallard v. Eastern Carolina Regional Housing Authority, 221 N. C. 334, 20 S.E. (2d) 281 (1942).

APPENDIX "B"

Circular Provisions of the United States Department of Housing and Urban Development—Circular of February 7, 1967

Department of Housing and Urban Development
Washington, D. C. 20410

Office of the Assistant Secretary
for Renewal and Housing Assistance

Circular
2-7-67

To: Local Housing Authorities
Assistant Regional Administrators for Housing Assistance

HAA Division and Branch Heads

From: Don Hummel

Subject: Terminations of Tenancy in Low-Rent Projects

Within the past year increasing dissatisfaction has been expressed with eviction practices in public low-rent housing projects. During that period a number of suits have been filed throughout the United States generally challenging the right of a Local Authority to evict a tenant without advising him of the reasons for such eviction.

Since this is a federally assisted program, we believe it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish.

In addition to informing the tenant of the reason(s) for any proposed eviction action, from this date each Local Authority shall maintain a written record of every eviction from its federally assisted public housing. Such records are to be available for review from time to time by

HUD representatives and shall contain the following information:

1. Name of tenant and identification of unit occupied.
2. Date of notice to vacate.
3. Specific reason(s) for notice to vacate. For example, if a tenant is being evicted because of undesirable actions, the record should detail the actions which resulted in the determination that eviction should be instituted.
4. Date and method of notifying tenant with summary of any conferences with tenant, including names of conference participants.
5. Date and description of final action taken.

The Circular on the above subject from the PHA Commissioner, dated May 31, 1966, is superseded by this Circular.

/s/ Don Hummel
Assistant Secretary for Renewal and Housing Assistance